U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 September 2006

CASE NO.: 2005-LHC-1210

OWCP NO.: 07-166803

IN THE MATTER OF:

H.C.[1]
Claimant

v.

BOH BROS. CONSTRUCTION CO.
Employer

and

INSURANCE CO. OF THE STATE OF PENNSYLVANIA
Carrier

APPEARANCES:

JOSEPH G. ALBE, ESQ.
For The Claimant

CHRISTOPHER K. LeMIEUX, ESQ.
For The Employer/Carrier

Before: LEE J. ROMERO, JR.
Administrative Law Judge

DECISION AND ORDER

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901, et seq., (herein the Act), brought by Claimant against Boh Bros. Construction Co. (Employer) and Insurance Co. of the State of Pennsylvania (Carrier).

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[1] Pursuant to a policy decision of the U.S. Department of Labor, the Claimant's initials rather than full name are used to limit the impact of the Internet posting of agency adjudicatory decisions for benefit claim programs.

The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for hearing. Pursuant thereto, Notice of Hearing was issued scheduling a formal hearing on April 18, 2006, in Covington, Louisiana. All parties were afforded a full opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs. Claimant offered six exhibits, Employer/Carrier proffered nine exhibits which were admitted into evidence along with one Joint Exhibit. This decision is based upon a full consideration of the entire record.[2]

Post-hearing briefs were received from the Claimant and the Employer/Carrier on or prior to the due date of June 9, 2006. Based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and having considered the arguments presented, I make the following Findings of Fact, Conclusions of Law and Order.

I. STIPULATIONS

At the commencement of the hearing, the parties stipulated (JX-4), and I find:

1. That the Claimant was injured on December 17, 2002.

2. That Claimant's injury occurred during the course and scope of his employment with Employer.

3. That there existed an employee-employer relationship between Claimant and Employer at the time of the accident/injury.

[2] References to the transcript and exhibits are as follows: Transcript: Tr._____ ; Claimant's Exhibits: CX-___; Employer/Carrier Exhibits: EX-___; and Joint Exhibit: JX-___.

4. That Claimant is entitled to continuing medical care for his neck which is considered appropriate, reasonable and necessary; and Employer is liable for any future medical treatment attributable to the December 17, 2002 injury.

5. That the Employer was notified of the accident/injury on December 17, 2002.

6. That Employer/Carrier filed a Notice of Controversion on January 3, 2004.

7. That an informal conference before the District Director was held on May 27, 2004.

8. That Claimant received temporary total disability benefits from February 28, 2003 through August 23, 2004, and from January 21, 2005 through present, at a weekly compensation rate of $516.92 for 141.6 weeks. Total disability benefits paid to Claimant was $73,181.10 at the date of hearing.

9. That Claimant's average weekly wage at the time of injury was $820.00, with a corresponding compensation rate of $546.67.

10. That medical benefits for Claimant have been paid in the amount of $26,504.19 pursuant to Section 7 of the Act.

II. ISSUES

The unresolved issues presented by the parties are:

1. The nature and extent of Claimant's injury and disability.

2. Whether Claimant has reached maximum medical improvement for all conditions which were caused by or related to his injury.

3. Whether medical care and services were delayed or denied.

4. Whether Employer has demonstrated suitable alternative employment.

5. Attorney's fees, penalties and interest.

III. STATEMENT OF THE CASE

Background

According to Employer's Post Hearing Brief, Claimant sustained injury on December 17, 2002, while checking damage on a flexi-float barge. Claimant stepped up on a painted pipe and slipped and fell, hitting his lower back and right arm/shoulder.

On July 23, 2003, Claimant underwent surgery, an anterior cervical discectomy decompression and inter-body fusion of the C5-6 and C6-7 discs. (EX-3, p. 7). The operation resulted in substantial relief of most symptoms. (Tr. 32). The parties agreed that Claimant was unable to return to prior employment, and a functional capacity evaluation was performed on May 13, 2004. (Tr. 21; EX-7, p. 1).

Between August 2004 and January 2005, Claimant returned to employment at Boh Brothers with restricted duties, but ceased working due to pain. Claimant has held no subsequent employment. (Tr. 60-61; EX-3, p. 15). Employer filed a notice of controversion on January 3, 2004. (JX-4).

The Testimonial Evidence

Claimant

Claimant was 54 years old at the date of formal hearing. (Tr.30). He obtained a GED after quitting high school in the 11th grade. He has had no other formal training. (Tr. 30).

Prior employment included approximately six years as first mate on tug boats for Gulf Fleet. During his employ, Claimant obtained a Coast Guard license after taking a two-week class. (Tr. 42-43). Claimant's duties included supervising crew members and keeping a log of activities during the six-hour shift. (Tr. 43-44).

Claimant has also worked as a commercial truck driver (Tr. 44-45), as an able Seaman for McDermott after passing a Coast Guard examination upon his first attempt (Tr. 46-48), at a tire store (Tr. 49), and in steel fabrication (Tr. 50-51). Claimant also worked at the Mason Chamberlain Ammunition Plant in the forge room located at Stennis Space Center. Claimant was taught to forge steel and aluminum ingots into shell parts. (Tr. 51-52).

Claimant was employed by Boh Brothers in 1990 as a welder, and advanced to welding foreman in 1995 or 1996. (Tr. 53). Claimant still held this position in December 2002 when he was injured while working on a flexi-float barge. His duties included supervising employees and welding. (Tr. 30-31). He worked with weights from five to over a hundred pounds. (Tr. 31). He was also involved with checking materials supplied against a buy list, preparing daily performance time sheets and accident reports. (Tr. 54, 56-57). His duties at Boh Brothers required him to look up at steel fabrication done overhead and to signal crane operators. (Tr. 35).

Claimant stated that with current work restrictions, he is not currently capable of performing any of the jobs that he has held in the past. (Tr. 66).

Following his injury, Claimant continued to work until an appointment with his family doctor, "Dr. Denney" that he had scheduled prior to the injury. Claimant assumed he had pulled a muscle. (Tr. 36).

Claimant testified that as a result of the injury he experienced numbness in his left arm and pain which radiated from his left shoulder down the left arm. (Tr. 32). James Denney, his family nurse practitioner, gave him pain medication and referred him to Dr. Bratton (a neurosurgeon). (Tr. 34).

In July 2003, Claimant underwent surgery to fuse vertebrae in his neck to relieve the condition. (Tr. 32). Claimant testified that "most of the symptoms went away" after surgery, but if he turns his head too far to one side, he has pain. Driving for a period of time causes pain between his shoulder blades because of "the bouncing up and down and jarring" and turning his head to view traffic. (Tr. 32-33).

Claimant did not apply for any jobs from November 2003 to August 2004. (Tr. 59-60). He was not aware that Dr. Bratton released him to return to work in November 2003. (Tr. 59).

From August 2004 through January 2005, Claimant returned to employment at Boh Brothers. He had difficulty performing his restricted job duties because of pain caused by commuting two and a half hours round trip, and looking up to work with cranes. (Tr. 32, 35). Claimant testified that he has pain after looking up for three or four minutes (Tr. 35), or when required to get into an odd position to inspect something. (Tr. 60). When he was not required to look up and had men to do "moving and lifting," the job did not bother him, but the ride did. (Tr. 36).

Claimant discontinued working at Boh Brothers in January 2003 on the recommendation of Dr. Bratton because of pain. (Tr. 36, 61). Boh Brothers has not offered any other positions to Claimant. (Tr. 36).

Claimant testified that after surgery Dr. Bratton, the treating neurosurgeon, "has more or less just told me to take it easy on what I do." As work restrictions, Dr. Bratton prescribed keeping head in a neutral position when working, and not to work with his arms above his shoulders, and no lifting heavy weights. (Tr. 33). Claimant is no longer being treated by Dr. Bratton on a regular basis. (Tr. 39-40).

Claimant was examined by Dr. Dowd, employer's chosen physician, in March 2006. He confirmed work limitations stated by Dr. Bratton, and suggested pain management, but did not recommend specific doctors or facilities. (Tr. 39).

None of Claimant's doctors have released him to return to the type of work he performed prior to the injury. (Tr. 31).

Claimant's current activity typically consists of spending time on the computer and a little yard work. He attempted gardening, but cannot spend much time on a tractor. Claimant stated he experiences pain if he attempts to lift heavy objects. (Tr. 34). He mows his own grass and uses a bush hog to mow his property twice a year.

(Tr. 61-62). Claimant owns two boats and continues to go fishing in Bay St. Louis, Mississippi. (Tr. 62).

Claimant has had no formal training in computer work, but can get on the internet, do searches, use e-mail and play games. (Tr. 41, 65). He sometimes stays on the computer three or four hours before experiencing eye strain. He stated he "can't sit there all day." (Tr. 41).

To treat pain, Claimant "sits around" until the pain dissipates, which may take a matter of hours or days. Claimant also takes over-the-counter Advil occasionally and Vicodin rarely for pain. He stated that he "is not big on pain pills." (Tr. 34). Pain experienced and severity thereof depends upon Claimant's activity level. Most days, Claimant does not experience much pain. (Tr. 66).

Claimant met with a rehabilitation specialist, Tom Stewart, assigned from the Department of Labor prior to his return to Boh Brothers in August 2004. Claimant testified the vocational counselor never found any jobs, but suggested a job as a security guard. (Tr. 40). On cross-examination, Claimant stated he told Mr. Stewart that he would rather not be a security guard at Hideaway Lake because a friend who worked there told him "people would . . . cuss you if you wouldn't let them in." (Tr. 127). Claimant said he was not informed of any job at Motel Six. (Tr. 127).

The evaluation process by Mr. Stewart was discontinued after Claimant returned to Boh Brothers in August 2004. (Tr. 40). Claimant stated that after he discontinued employment with Boh Brothers in January 2005, he did not contact Mr. Stewart because he did not know if he "could or not." (Tr. 128-129). Since January 2005 Claimant has not applied for any jobs. He stated "I talked to people, but I haven't officially filled out an application." (Tr. 129).

Claimant stated he turned down a job running a bulldozer because "I couldn't handle the beating around and banging." (Tr. 40-41). Claimant has considered opening a motorcycle parts store, selling parts and accessories, but is not sure he could. (Tr. 35). He has done no research or taken any other steps to organize the venture. (Tr. 64).

Claimant's rate of pay was $20.50 per hour at the time of the injury. (Tr. 36). Workers' compensation benefits were initially paid at a rate of approximately $416 per week. Benefits were later changed to $1,033.84 every two weeks. The difference between the initial rate and the revised rate was paid to Claimant. (Tr. 36-37, 59). Initial benefits were delayed three to four weeks, and some later benefits were delayed due to "computer glitches." (Tr. 38).

Claimant received one payment for mileage over a year after the incident. Claimant has not received payment for mileage from January 2005 until the present. (Tr. 38).

Claimant testified that no medical treatment was refused by Employer. (Tr. 37). On cross-examination, he confirmed that Boh Brothers eventually paid for all requested medical treatment, although "some, it took a while to get." (Tr. 58).

Nancy Favaloro, MS, CRC
Licensed Rehabilitation Counselor

Nancy Favaloro was called to testify at hearing (Tr. 67), and submitted a Vocational Rehabilitation Report (EX-5). The parties stipulated to her expertise as a vocational rehabilitation expert. (Tr. 68).

Ms. Favaloro stated she got the case at the beginning of February (2006). (Tr. 68). She reviewed several documents including medical case management notes, records of the health care providers, and a functional capacity evaluation done in May 2004. (Tr. 69). She interviewed Claimant on March 21, 2006. (Tr. 69).

Ms. Favaloro sent a letter to Dr. Bratton on March 21, 2006 asking if he agreed with the work restrictions set forth in the May 2004 Functional Capacity Evaluation. Dr. Bratton responded that he did agree (Tr. 70), and included a statement that "Whether he [Claimant] will be successful on long term will depend on his level of pain and the specifics of the job." (Tr. 124). On cross examination, Ms. Favaloro testified concerning the note: "I would think that means the specifics of the job. My understanding of that would be within the restrictions that are set forth." Ms. Favaloro stated that she did not contact Dr. Bratton to

clarify the issue because "I felt sure I understood clearly what he indicated." (Tr. 124).

In her vocational rehabilitation report issued March 27, 2006, she used work restrictions as set forth in the May 2004 FCE in her evaluation. (Tr. 70). Ms. Favaloro stated that with Claimant's work restrictions he cannot do a full range of medium work because of a 40 pound lifting restriction (Tr. 97-98) which is considered "light to medium" (Tr. 123), but stated "he certainly has the ability physically to do a lot of different tasks." (Tr. 97-98). The jobs identified do not involve overhead work, although the functional capacity evaluation indicated Claimant could do overhead work on a frequent basis. (Tr. 122).

During Ms. Favaloro's interview of Claimant, she reviewed his daily activity to include use of the computer to play games, get on the internet, and e-mail. He has a home in Waveland, Mississippi that sustained hurricane damage. He just secured contractors and was trying to drive back and forth to check on the work. (Tr. 71). When asked if that part of the interview was significant to vocational rehabilitation, Ms. Favaloro stated that some familiarity with a computer is important in a job search. (Tr. 72).

Ms. Favaloro then reviewed Claimant's educational information and work history. (Tr. 71). During his work history, Claimant had been a foreman for several years, supervising other workers, he used equipment and tools, monitored machinery, and operated bulldozers and some cranes for various companies. (Tr. 72). Claimant has held various jobs including self-employment as owner and operator of equipment for the Forestry Commission, roofing, and as a deckhand, able-bodied seaman, and mate. (Tr. 72).

Ms. Favaloro stated that Claimant's testimony was not different than her conversation with him. He was able to learn new tasks and has a steady work history. The fact that he was able to take tests and pass them the first time was significant. (Tr. 73). He has "demonstrated at least average aptitude in general intelligence . . . the ability to learn new job tasks." (Tr. 74).

Ms. Favaloro administered achievement tests and Claimant scored post-high school level in word pronunciation and reading comprehension, which is above average. He scored at 9.7 grade level in math which is within average. (Tr. 74-75).

Ms. Favaloro did a transferable skills analysis, where the Claimant's skills and abilities are compared to job requirements as listed in the *Dictionary of Occupational Titles*. (Tr. 75). Claimant's skills as demonstrated in prior employment include application of principles of rational thinking to solve practical problems, use of judgment in decisions and work to precise set limits and standards, and worked in situations where tasks change frequently. (Tr. 76). Based on work history and achievement testing, Ms. Favaloro concluded that Claimant does have transferable skills. (Tr. 77).

Having determined appropriate restrictions as outlined in the May 2004 Functional Capacity Evaluation (FCE) as verified by Dr. Bratton, and having determined that Claimant has transferable skills (Tr. 70, 77), Ms. Favaloro looked at the labor market in Claimant's area. The worker's profile given to employers usually consists of their age, education, type of work they have done in the past, and work restrictions. (Tr. 78). Since Claimant lived in Picayune, Mississippi, the Slidell, Louisiana area, about 20 miles away, was used. Ms. Favaloro considers Slidell to be in Claimant's geographic region. (Tr. 82).

Based on this analysis, in the opinion of Ms. Favaloro, the following jobs were considered appropriate for Claimant, as they are in his geographic region, and he possesses the requisite skills and education to perform them. Job availability was as of "around" May 2004. (Tr. 78, 96; EX-5, pp. 5-8). All jobs are full-time requiring work for eight hours per day, forty hours per week (Tr. 112), and are within the restrictions outlined by Dr. Bratton. (Tr. 79).

The job of **Outside Cashier** at Northpark Carwash in Slidell was identified. The worker is located outside under a canopy, with duties to accept payments from customers, provide change, and count money and receipts at the end of a shift. (Tr. 78, 112; EX-5, p. 5) The

worker would mostly stand at work, and lifting is less than ten pounds. (Tr. 78). Job training is provided. Skills needed are communication skills, and basic reading and writing. Wages are $8.50 per hour. (EX-5, p. 5). This job is classified as light. (Tr. 79). Northpark Carwash was hiring in January 2005 and was currently hiring in March 2006. (Tr. 79). Ms. Favaloro is of the opinion that Claimant has transferable skills and education adequate to perform this job. (Tr. 81).

The job classification of **Component Assembler** at Windward, Incorporated in Slidell was identified. In this job, the worker assembled hydraulic and pneumatic components and must lift up to 40 pounds on occasion and will perform repetitive tasks assembling parts. He can alternately sit, stand and walk. (Tr. 80-81; EX-5, p. 5). Attention to detail is required. (Tr. 80). The wage rate was $10.00 per hour. (EX-5, p. 5). This employer had a job available in mid-2004, but was unable to determine if it had jobs available in January 2005. (Tr. 81).

Ms. Favaloro stated she did not view the work at the facility, but people in her office have. (Tr. 113). The Component Assembler is provided with a drawing or blueprint that is placed in front of them; some "bench work" is required. The actual component is usually placed in front of them, and the worker sits or stands when assembling. (Tr. 113). The height of the bench would be "like your table height." (Tr. 114). When asked if the worker would be looking down, Ms. Favaloro stated "Usually. Or he could put it . . . on something and look straight out." (Tr. 114).

An entry-level **Lab Technician** job consisting of making dental appliances at a dental lab company was also noted. (Tr. 83). The worker would be seated at a bench or table to perform the work. (Tr. 115). The wage rate is $7.50 to $8.50 per hour. The company indicated that the job was opened on March 22, 2006, and they had hired in May 2004, June 2004 and January 2005. (Tr. 83-84). Lifting required is less than ten pounds, and the worker will alternately sit and stand. (Tr. 85; EX-5, p. 5). Ms. Favaloro opined that this job would probably be classified as sedentary. (Tr. 85).

The job of **Manager Trainee** with Security Finance, a small loan company in Slidell, Louisiana was identified. A GED or high school education, transportation to work, basic keyboard knowledge and good communication skills are required. (Tr. 85; EX-5, p. 5). Job duties consist of accepting and verifying loan applications, assisting customers through the loan process, determining loan eligibility, and collection activity including occasional driving to pick up loan payments in the Slidell area. Training is provided. (Tr. 85; EX-5, pp. 5-6). Required lifting is up to 20 pounds, and the classification is light. (Tr. 86). The wage rate for this position is $10.00 per hour. (Tr. 86; EX-5, p. 6). The job was available on March 22, 2006, and the company indicated it was "very likely" they hired in May 2004. They also hired in February 2005. (Tr. 86-87).

A **Sales Associate** with Home Depot in Covington, Louisiana was noted. (Tr. 87; EX-5, p. 6). The associate assists customers with finding products, looks up information on a computer, and monitors inventory. Ms. Favaloro stated Home Depot will consider someone with a 40-pound lifting restriction. (Tr. 88). Alternate standing and walking is required, and the associate can sit at breaks and during lunch periods. (EX-5, p. 6). Ms. Favaloro stated that this job is within Claimant's geographic region. (Tr. 88). The rate of pay is $8.00 per hour. The company believes it hired in May 2004 and noted frequent openings at the beginning of summer. (EX-5, p. 6). Jobs were available on March 22, 2006. (Tr. 89).

The next job classification identified was **Product Specialist** for Circuit City in Slidell. (Tr. 94; EX-5, p. 6). Duties consist of selling various electronic products and operating a computerized register. The job required alternate standing and walking, and lifting less than 20 pounds. (EX-5, p. 6). Training is provided. The wage rate is $8.00 to $9.00 per hour. Job openings were available in March 2006, and the company may have still been hiring in May 2004 after the store opened in April 2004. (Tr. 94).

A **Communications Officer** job as a "911 operator" for the City of Slidell was noted as a sedentary position with no meaningful lifting. Duties consist of receiving and screening calls for emergency services and dispatching

appropriate authorities. (Tr. 89-90; EX-5, p. 6). Ms. Favaloro described the process as input of information into a computer after it is hand written. (Tr. 89). Requirements include basic typing (EX-5, p. 6), passing a reading comprehension test and a Civil Service examination and high school diploma or GED. Based on tests administered by her, Ms. Favaloro believes Claimant could pass both tests. Job openings were available on March 22, 2006, and the rate of pay is $10.18 per hour. (Tr. 89-90; EX-5, p. 6).

The final job classification listed is **Service Advisor** for Dub Herring Ford, an automobile dealership in Picayune, Mississippi. (Tr. 92-93). Duties include meeting with customers to discuss their vehicle concerns and input into a computer, completing repair orders and dispatching them to technicians. Skills required are basic computer skills and the ability to deal with the public. The worker will alternately sit, stand, and walk and will not lift over 20 pounds. This job is classified as light and pays $25,000 - $30,000 per year. The employer will hire in April 2006 and hired in December 2004. (Tr. 92; EX-5, pp. 6-7).

On cross-examination, Ms. Favaloro testified that in a typical setting for this type of position, the worker will get up to talk to the customer, then sit at a desk or table to write down what is wrong with the car. The service advisor then brings paperwork to a technician who will tell him "when they can get to it." The service advisor will be trained to work up the price. (Tr. 118).

Ms. Favaloro stated that other jobs were available in January 2005. These are in addition to those listed in the vocational report. A position with an orthodontic company in Abita, Louisiana was noted with duties similar to those of **Lab Technician** position at the dental lab. Starting pay was $7.00 per hour with incremental raises to $10.00 per hour after one year. Another position is **Sales Representative** with Protocol in Covington, Louisiana with duties of taking orders from callers. The pay rate is $7.00 per hour with a merit based increase after 90 days. (Tr. 95-96).

In the opinion of Ms. Favaloro, Claimant's earning capability in May 2004 was $7.50 per hour to about $15.00 per hour, and is the same at the time of hearing. (Tr. 98).

Additionally, Claimant indicated to Ms. Favaloro that he plans to move to Bay St. Louis, Mississippi and possibly open a store for after market motorcycle accessories. It is the opinion of Ms. Favaloro that this would be suitable employment for Claimant, but stated it is hard to determine wages in this type of self-employment. (EX-5, p. 7).

Ms. Favaloro does not know if Claimant was told about any of these jobs prior to or after her involvement, (Tr. 124) which began in February 2006. (Tr. 98-99).

When asked if travel was a factor in any of the positions, Ms. Favaloro responded "Slidell is only . . . 20 miles away, and that's usually within an acceptable commuting distance." Ms. Favaloro agreed that travel anywhere in the Greater New Orleans area probably takes longer after Hurricane Katrina. (Tr. 119). When asked if she was aware that Claimant had difficulty driving, Ms. Favaloro affirmed that Claimant reported he can drive for about forty-five minutes before having difficulty. (Tr. 120). Claimant indicated in the interview by Ms. Favaloro that he "mostly drives locally," and can drive about forty-five minutes maximum before he has to "stop and stretch." (EX-5, p. 2).

Ms. Favaloro stated that she had not reviewed Dr. Bratton's deposition. Ms. Favaloro was asked if Dr. Bratton had opined that Claimant was to avoid working at a desk requiring him to look down for extended periods of time, would any of her opinions on these jobs be affected. (Tr. 120). Ms. Favaloro responded that the FCE did not indicate the restriction, and the sales jobs, service adviser, and outside cashier did not require looking down for extended periods. (Tr. 120-121). She believes that regarding the assembler and lab technician jobs, the worker could "put them (items to be assembled) on a box . . . then you don't have to look down quite as much." (Tr. 121). The communication officer position requires looking at a monitor that is even with eye level. The manager trainee job contains varied activities so that constant looking down would not be required. (Tr. 121).

Ms. Favaloro had not previously seen a vocational rehabilitation report dated July 12, 2004, issued by Tom Stewart, a rehabilitation counselor assigned by the Department of Labor. (Tr. 100). The report by Tom Stewart

concludes "there does not appear to be any reliable, useable, lighter transferable skills to utilize in approaching employers with semi-skilled to skilled lighter jobs." (Tr. 102; CX-7, p. 11). Ms. Favaloro disagrees with the conclusion because the manager trainee job is classified by the *DOT* (*Dictionary of Occupational Titles*) as semi-skilled albeit entry level. The difference in opinions may be only a matter of semantics. (Tr. 109-110).

Ms. Favaloro agreed that Claimant cannot go back to his job at Boh Brothers "as he performed it." (Tr. 112).

The Medical Evidence

Dr. Bert Bratton

Dr. Bert Bratton, a board-certified neurosurgeon, was deposed by the parties on March 21, 2006. (EX-3, p. 5). He discontinued performing surgery in January 2005 due to a multi-level cervical disc disease. (EX-3, pp. 5-6).[3]

Claimant was referred to Dr. Bratton by James Denney, his family nurse practitioner. (Tr. 34). Dr. Bratton performed a myelogram on Claimant on May 15, 2003, which revealed "narrowing of the spinal canal, stenosis at the 5-6 and 6-7 lobs." (EX-3, pp. 6-7) Dr. Bratton recommended surgery. Dr. Bratton performed an anterior cervical discectomy decompression and inter-body fusion of the C5-6 and C6-7 level on July 23, 2003. (EX-3, p. 7).

Claimant reported good relief of symptoms following the surgery. Dr. Bratton stated that at the post-op visit on October 17, 2003, Claimant was "doing quite well," but noticed that Claimant could not look up or turn his head too much, which is not unusual for two level fusion. (EX-3, pp. 10-11).

Dr. Bratton stated that after a two-level fusion the main restriction is to avoid repetitive movement of the head and neck, looking up or down. The extent of aggravation due to looking down is a function of time and repetition of the action. (EX-3, p. 8). The occasional

[3] Dr. Bratton stated that he has an auto fusion of C5-6 and C6-7, a condition very similar to that of Claimant. As a result of the fusion, Dr. Bratton was forced to discontinue performing surgery because he could not look down for the necessary length of time. Previously, Dr. Bratton performed surgery two days a week. (EX-3, pp. 8-9).

things that everybody does in their normal lifestyle should not be a problem. However, a job where looking down is a primary focus of the job should be avoided. (EX-3, p. 9).

Claimant saw Dr. Bratton again on November 25, 2003. Dr. Bratton believed at that point, Claimant had reached maximum medical improvement, and instructed him to return only on an "as needed" basis. (EX-3, p. 11).

Dr. Bratton informed Claimant prior to surgery that it would not be feasible for him to return to his previous employment as a commercial welder foreman. He stated his recommendation that a FCE be performed arose over the question of Claimant's specific limitations. (EX-3, pp. 11-12).

On February 27, 2004, Dee Child, R.N., Medical Case Manager with FARA Healthcare Management, wrote to Dr. Bratton requesting that he fax a prescription for an FCE to her to determine if Boh Brothers Construction will be able to accommodate claimant's restrictions. (EX-8, p. 9). After reviewing Dr. Dowd's report, Dr. Bratton stated in correspondence to Ms. Child on March 9, 2004, that he felt an FCE would "obviously" show Claimant could work in a light capacity, and an FCE would be useful to the extent of identifying restrictions within the light duty category. (EX-8, p. 10).

A FCE was performed on May 13, 2004. Although the FCE estimated a physical demand level of medium, Dr. Bratton stated he would "probably have gone more on the light category." Dr. Bratton noted that his February 27, 2004 notes indicate that he predicted a range of light to medium. (EX-3, p. 12). Dr. Bratton stated "a medium category of work would not re-injure him and that's our main obligation." However, success in the category will depend upon how much pain and difficulty the person has in performing the job. (EX-3, p. 13).

After returning to work at Boh Brothers, Claimant presented on January 21, 2005, with complaints of pain at the base of his neck, shoulders, left more than right, upper neck pain and occasional headaches. (EX-3, pp. 14-15). Claimant had not missed any days because of the pain, but was having significant problems. Claimant drove a pick-up truck an hour and forty-five minutes each way to work. He was not doing any welding, but worked with cranes

which required looking up. He was having problems due to looking up and driving, and was very inactive on weekends, "just resting up." (EX-3, p. 15).

Dr. Bratton stated that driving would not injure Claimant, but driving a vehicle is the type of activity that can be a stress factor to the neck because of the need to look around to check traffic and mirrors. Driving is in the category of activity that is okay for Claimant to "try it and see what would happen." (EX-3, pp. 15-16).

To determining whether the activity is an issue, Dr. Bratton stated he must rely on what the patient reports. Claimant reported driving and watching the cranes specifically as problematic. (EX-3, pp. 15-16). Dr. Bratton opined "you have to listen to symptoms as they occur, and with a two level fusion you're going to shift stress to the adjacent levels." The fact that he was having symptoms indicates stress on the adjacent levels which, if continued, may cause the adjacent area to wear out sooner, necessitating more surgery. (EX-3, pp. 16-17).

On February 1, 2005, Dr. Bratton noted Claimant was unable to return to previous employment of welding supervisor. Dr. Bratton stated he felt that would be on a permanent basis. (EX-3, p. 16).

At Claimant's last visit on August 11, 2005, Dr. Bratton was still of the opinion that Claimant is permanently unable to return to his former employment. (EX-3, p. 19). He noted that Claimant mows grass for one-half hour at a time, and occasionally fishes, but cannot fish if water is rough. (EX-8, p. 16).

Dr. Bratton opined that Claimant can return to some type of work under restrictions outlined in a light to medium range. (EX-3, pp. 17-18). Whether or not Claimant will be successful long term would depend upon whether or not he had any symptoms while doing that work, but the light to medium category would not injure him. (EX-3, p. 20).

Dr. Bratton disagreed with Dr. Dowd's recommendation of work conditioning stating that he did not believe it would make any practical difference. (EX-8, p. 10).

Dr. Gregory Dowd

Dr. Gregory Dowd[4] evaluated Claimant on April 3, 2003, for the purpose of rendering a second opinion. (EX-9, pp. 1, 6). Dr. Dowd agreed that a two-level fusion would be reasonable under the circumstances. (CX-3, p. 3). Dr. Dowd updated that evaluation on January 15, 2004, after Claimant's discectomy and fusion surgery. (EX-9, pp. 1, 6).

In January 2004, Dr. Dowd noted that he believed Claimant had reached maximum medical improvement from his surgery. He felt Claimant could return to light duty work with a lift limit of 25 pounds, avoiding working with his arms above his head, and with a minimum of headgear. He also recommended work conditioning which he believed could advance Claimant's lift limit. (EX-9, p. 6).

Claimant again saw Dr. Dowd on March 3, 2005. Dr. Dowd reviewed the FCE performed on May 13, 2004, and an MRI of the cervical spine of November 2004. Dr. Dowd opined: "I do feel the prior neck injury has persisted despite appropriate surgical and medical treatment for this condition." He recommended additional testing and consideration of anti-inflammatory medication or cervical injection to minimize pain. He also felt Claimant could return to light-duty work, noting that construction type activity requiring neck bending for upward vision and use of a hardhat may contribute to ongoing pain. (EX-9, p. 9).

The May 13, 2004 Functional Capacity Evaluation

A Functional Capacity Evaluation was performed on May 13, 2004 by Performance Physical Therapy, with a report rendered on May 18, 2004. (EX-7, pp. 1, 14). Claimant was found to have demonstrated consistent effort in the evaluation, and the validity of the result was determined to be "good." (EX-7, pp. 1, 13).

The Physical Demand Level (PDL) capacity of Claimant was estimated to be "medium" as defined in the *Dictionary of Occupational Titles*, based on an 8-hour work day subject to restrictions. (EX-7, pp. 1, 4).

[4] Dr. Dowd's medical credentials are not stated in the record.

Restrictions as set forth in the FCE are:

- Occasional lifting of up to 40 lbs.
- Frequent lifting of up to 20 lbs.
- Occasional carrying of up to 45 lbs.
- Avoid excessive and sustained cervical AROM (active range of motion) and positions.
- Allow occasional but brief change of position from sitting.

(EX-7, p. 4).

- Work Tolerance Restrictions for Pain were noted for the following activities or positions:

    - Sit: Back Supported and Unsupported
    - Crouching
    - Kneeling Sequence
    - Using Hands Overhead (sustained or repeated)

(EX-7, p. 6).

The FCE determined that Claimant had sufficient residual functional capacity to safely return to his prior job as a Welder Foreman with the restrictions described. (EX-7, p. 4).

Claimant drove approximately 90 minutes to the clinic, and reported pain of 4 on a 10-point scale upon arrival. (EX-7, p. 10). Claimant reported pain prior to the test, following the test, and the next day of 4 on a 10-point scale which is considered moderate. (EX-7, p. 2). In his response in the FCE "following day" questionnaire, Claimant indicated that pain intensified on the ride home and eased off after he rested. (EX-7, p. 2). He also reported he was still having pain in his neck that had not been normal since having surgery, particularly when turning his head left and right, and looking up. (EX-7, p. 2). Claimant also stated in response to interrogatories that he was in pain for several days following the evaluation. (EX-6, p. 4).

The Additional Vocational Evidence

Vocational Rehabilitation Report by Tom Stewart & Associates

An initial vocational rehabilitation report dated May 27, 2004 and subsequent vocational rehabilitation report dated July 12, 2004, were rendered by Tom Stewart, a licensed rehabilitation counselor. (CX-5, pp. 5, 8).

Mr. Stewart initially met with Claimant on May 11, 2004, at Claimant's home in Pine Grove, a rural community about 8 to 9 miles outside of Picayune, Mississippi. (CX-7, pp. 8-9). Mr. Stewart reviewed Claimant's history and the restrictions imposed by Dr. Bratton. (CX-7, p. 9). Claimant related episodic aching pain in his "lower neck" if he attempts to ride in a vehicle for too long or operate his tractor, or continuous overhead use of his arms. (CX-7, p. 10). After reviewing Claimant's work history, Mr. Stewart concluded that there does not appear to be useable lighter transferable skills to utilize in approaching employers with semi-skilled and skilled lighter jobs. (CX-7, p. 11).

In his report dated May 27, 2004, Mr. Stewart outlined Claimant's work restrictions as limited to the light physical demands classification with the specific restriction of not using his hands and arms at shoulder height or above. (CX-7, p. 8).

In his report dated July 12, 2004, Mr. Stewart stated that he visited five employers in the Picayune area who historically have had lighter job openings. He found two employers who had openings at that time; Motel 6 had an opening for a part-time Front Desk Clerk, Professional Security Services had openings for part-time and full-time Gate Guards at Hide-A-Way Resort. (CX-7, p. 5).

Mr. Stewart again met with Claimant on July 1, 2004. Claimant stated that he was not adverse to lower paying unskilled or semi-skilled employment. Claimant further stated he was presently providing baby-sitting during the day for two children of his daughter who was in the Air Force and due to come home in August. Claimant also stated

he was contemplating moving to Bay St. Louis, Mississippi. Mr. Stewart noted Claimant would have more employment opportunities in Bay St. Louis if he moved there. (CX-7, p. 6).

Efforts by Mr. Stewart to identify suitable alternative employment were discontinued after Claimant returned to work at Boh Brothers in August 2004. (Tr. 40).

The Contentions of the Parties

Claimant contends that he is temporarily totally disabled because he has not reached maximum medical improvement for conditions related to a compensable injury sustained on December 17, 2002, is unable to return to his former job, and that Employer has failed to demonstrate suitable alternative employment. He contends that his total disability began at the date of his accident and continues, except for a period in which he returned to work.

Claimant also contends that weekly compensation was initially delayed, and has since been paid at an incorrect rate, and some medical expenses were delayed or not paid. Accordingly, Claimant requests that temporary total disability benefits be ordered at the correct rate, interest and penalties be awarded on any amounts delayed or unpaid, as well as attorney fees.

Employer/Carrier contend that Claimant reached MMI on November 25, 2003, for purposes of this claim, benefits were paid timely after Claimant ceased working and no medical treatment requested has been denied to Claimant. Because no dispute had arisen, Employer/Carrier was not required to file a notice of controversion, therefore, Claimant is not entitled to Section 14(e) penalties. Employer/Carrier contend they have met their burden of establishing available suitable alternative employment and Claimant is entitled to no or reduced benefits and Employer/Carrier are entitled to a credit for overpayments.

IV. DISCUSSION

It has been consistently held that the Act must be construed liberally in favor of the Claimant. Voris v. Eikel, 346 U.S. 328, 333 (1953); J. B. Vozzolo, Inc. v. Britton, 377 F.2d 144 (D.C. Cir. 1967). However, the

United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of the Claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedure Act, 5 U.S.C. Section 556(d), which specifies that the proponent of a rule or position has the burden of proof and, thus, the burden of persuasion. Director, OWCP v. Greenwich Collieries, 512 U.S. 267, 114 S.Ct. 2251 (1994), aff'g. 990 F.2d 730 (3rd Cir. 1993).

In arriving at a decision in this matter, it is well-settled that the finder of fact is entitled to determine the credibility of all witnesses, to weigh the evidence and draw his own inferences therefrom, and is not bound to accept the opinion or theory of any particular medical examiners. Duhagon v. Metropolitan Stevedore Company, 31 BRBS 98, 101 (1997); Avondale Shipyards, Inc. v. Kennel, 914 F.2d 88, 91 (5th Cir. 1988); Atlantic Marine, Inc. and Hartford Accident & Indemnity Co. v. Bruce, 551 F.2d 898, 900 (5th Cir. 1981); Bank v. Chicago Grain Trimmers Association, Inc., 390 U.S. 459, 467, reh'g denied, 391 U.S. 929 (1968).

A. Nature and Extent of Disability

The parties stipulated that Claimant suffers from a compensable injury, however the burden of proving the nature and extent of his disability rests with the Claimant. Trask v. Lockheed Shipbuilding Construction Co., 17 BRBS 56, 59 (1980).

Disability is generally addressed in terms of its nature (permanent or temporary) and its extent (total or partial). The permanency of any disability is a medical rather than an economic concept.

Disability is defined under the Act as an "incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Therefore, for Claimant to receive a disability award, an economic loss coupled with a physical and/or psychological impairment must be shown. Sproull v. Stevedoring Servs. of America, 25 BRBS 100, 110 (1991). Thus, disability requires a causal connection between a

worker's physical injury and his inability to obtain work. Under this standard, a Claimant may be found to have either suffered no loss, a total loss or a partial loss of wage earning capacity.

Permanent disability is a disability that has continued for a lengthy period of time and appears to be of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. Watson v. Gulf Stevedore Corp., 400 F.2d 649, pet. for reh'g denied sub nom. Young & Co. v. Shea, 404 F.2d 1059 (5th Cir. 1968)(per curiam), cert. denied, 394 U.S. 876 (1969); SGS Control Services v. Director, OWCP, 86 F.3d 438, 444 (5th Cir. 1996). A claimant's disability is permanent in nature if he has any residual disability after reaching maximum medical improvement. Trask, supra, at 60. Any disability suffered by Claimant before reaching maximum medical improvement is considered temporary in nature. Berkstresser v. Washington Metropolitan Area Transit Authority, 16 BRBS 231 (1984); SGS Control Services v. Director, OWCP, supra, at 443.

B. Maximum Medical Improvement (MMI)

The traditional method for determining whether an injury is permanent or temporary is the date of maximum medical improvement. See Turney v. Bethlehem Steel Corp., 17 BRBS 232, 235, n. 5 (1985); Trask v. Lockheed Shipbuilding Construction Co., supra; Stevens v. Lockheed Shipbuilding Company, 22 BRBS 155, 157 (1989). The date of maximum medical improvement is a question of fact based upon the medical evidence of record. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 186 (1988); Williams v. General Dynamics Corp., 10 BRBS 915 (1979).

An employee reaches maximum medical improvement when his condition becomes stabilized. Cherry v. Newport News Shipbuilding & Dry Dock Co., 8 BRBS 857 (1978); Thompson v. Quinton Enterprises, Limited, 14 BRBS 395, 401 (1981).

In the present matter, nature and extent of disability and maximum medical improvement will be treated concurrently for purposes of explication.

Prefatorily, it is noted the opinion of a treating physician may be entitled to greater weight than the opinion of a non-treating physician under certain circumstances. Black & Decker Disability Plan v. Nord, 123 S.Ct. 1965, 1970 n. 3 (2003) (in matters under the Act, courts have approved adherence to a rule similar to the Social Security treating physicians rule in which the opinions of treating physicians are accorded special deference) (citing Pietrunti v. Director, OWCP, 119 F.3d 1035 (2d Cir. 1997) (an administrative law judge is bound by the expert opinion of a treating physician as to the existence of a disability "unless contradicted by substantial evidence to the contrary")); Rivera v. Harris, 623 F.2d 378 (5th Cir. 2000) (in a Social Security matter, the opinions of a treating physician were entitled to greater weight than the opinions of non-treating physicians).

The only medical opinions of record regarding MMI are those of Dr. Bratton and Dr. Dowd. Dr. Bratton is of the opinion that Claimant reached maximum medical improvement on November 25, 2003.

While both physicians agree that Claimant has reached MMI with regard to the surgery performed by Dr. Bratton on July 23, 2003, Dr. Dowd is of the opinion that Claimant's lifting ability could be increased from approximately 25 pounds to approximately 40 pounds with work conditioning. Dr. Bratton, Claimant's treating physician, disagrees. Rather, Dr. Bratton opined that such therapy would make no practical difference. The extent of the disagreement between the medical opinions is slight.

It is noted that the record indicates Dr. Bratton is a board-certified neurosurgeon and the credentials of Dr. Dowd are absent from the record. Dr. Bratton is also the treating physician and has treated Claimant's symptoms and had more contact with Claimant than has Dr. Dowd. Accordingly, I find Dr. Bratton's opinion should be afforded greater weight than that of Dr. Dowd, and find that Claimant reached MMI on November 25, 2003.

Since Claimant reached MMI on November 25, 2003, the nature of Claimant's disability, should disability be found to exist, is permanent as of that date.

The question of extent of disability is an economic as well as a medical concept. Quick v. Martin, 397 F.2d 644 (D.C. Cir 1968); Eastern S.S. Lines v. Monahan, 110 F.2d 840 (1st Cir. 1940); Rinaldi v. General Dynamics Corporation, 25 BRBS 128, 131 (1991).

To establish a **prima facie** case of total disability, the claimant must show that he is unable to return to his regular or usual employment due to his work-related injury. Elliott v. C & P Telephone Co., 16 BRBS 89 (1984); Harrison v. Todd Pacific Shipyards Corp., 21 BRBS 339 (1988); Louisiana Insurance Guaranty Association v. Abbott, 40 F.3d 122, 125 (5th Cir. 1994).

Claimant's present medical restrictions must be compared with the specific requirements of his usual or former employment to determine whether the claim is for temporary total or permanent total disability. Curit v. Bath Iron Works Corp., 22 BRBS 100 (1988). Once Claimant is capable of performing his usual employment, he suffers no loss of wage earning capacity and is no longer disabled under the Act.

The FCE performed on May 13, 2004, estimated that Claimant "**had sufficient residual functional capacity to safely return to his prior job as a Welder Foreman** with the restrictions described." The restrictions limited weight lifted to forty-five pounds and weight carried to forty pounds. Claimant testified that in his regular employment he worked with weights from five to over one hundred pounds. Therefore, the results of the FCE indicate Claimant may no longer perform his regular employment.

Claimant returned to work at Boh Brothers from August 2004 until January 2005. While working, Claimant was not required to perform welding which had previously been required. Claimant was required to look up at cranes, which arguably involves restricted activity of sustained cervical AROM (active range of motion) as listed in the FCE. Claimant also complained of pain due to excessive driving.

Claimant returned to Dr. Bratton after experiencing persistent pain. Dr. Bratton noted on February 1, 2005, that Claimant was not able to return to his regular employment.

Dr. Bratton testified that he informed Claimant prior to surgery that it would not be feasible for him to return to his previous employment as a commercial welder foreman. Both Dr. Bratton and Dr. Dowd agree that Claimant is permanently unable to return to his former regular employment.

Based on the foregoing, I find that Claimant reached maximum medical improvement on November 25, 2003, and he is permanently unable to return to his former regular employment as a result of his work-related injury. Claimant has therefore established a **prima facie** case of permanent total disability. Since the extent of disability is an economic as well as a medical inquiry, the extent of disability will be determined by whether or not suitable alternative employment is shown, and the economic value of such employment.

C. Suitable Alternative Employment

If the claimant is successful in establishing a **prima facie** case of total disability, the burden of proof is shifted to employer to establish suitable alternative employment. New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1038 (5th Cir. 1981). Addressing the issue of job availability, the Fifth Circuit has developed a two-part test by which an employer can meet its burden:

> (1) Considering claimant's age, background, etc., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained to do?
>
> (2) Within the category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he reasonably and likely could secure?

Id. at 1042. Turner does not require that employers find specific jobs for a claimant; instead, the employer may simply demonstrate "the availability of general job openings in certain fields in the surrounding community." P & M Crane Co. v. Hayes, 930 F.2d 424, 431 (1991); Avondale Shipyards, Inc. v. Guidry, 967 F.2d 1039 (5th Cir. 1992).

However, the employer must establish **the precise nature and terms** of job opportunities it contends constitute suitable alternative employment in order for the administrative law judge to rationally determine if the claimant is physically and mentally capable of performing the work and that it is realistically available. Piunti v. ITO Corporation of Baltimore, 23 BRBS 367, 370 (1990); Thompson v. Lockheed Shipbuilding & Construction Company, 21 BRBS 94, 97 (1988). The administrative law judge must compare the jobs' requirements identified by the vocational expert with the claimant's physical and mental restrictions based on the medical opinions of record. Villasenor v. Marine Maintenance Industries, Inc., 17 BRBS 99 (1985); See generally Bryant v. Carolina Shipping Co., Inc., 25 BRBS 294 (1992); Fox v. West State, Inc., 31 BRBS 118 (1997). Should the requirements of the jobs be absent, the administrative law judge will be unable to determine if claimant is physically capable of performing the identified jobs. See generally P & M Crane Co., 930 F.2d at 431; Villasenor, supra. Furthermore, a showing of only one job opportunity may suffice under appropriate circumstances, for example, where the job calls for **special skills** which the claimant possesses and there are few qualified workers in the local community. P & M Crane Co., 930 F.2d at 430. Conversely, a showing of one **unskilled** job may not satisfy Employer's burden.

Once the employer demonstrates the existence of suitable alternative employment, as defined by the Turner criteria, the claimant can nonetheless establish total disability by demonstrating that he tried with reasonable diligence to secure such employment and was unsuccessful. Turner, 661 F.2d at 1042-1043; P & M Crane Co., 930 F.2d at 430. Thus, a claimant may be found totally disabled under the Act "when physically capable of performing certain work but otherwise unable to secure that particular kind of work." Turner, 661 F.2d at 1038, quoting Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003 (5th Cir. 1978).

The Benefits Review Board has announced that a showing of available suitable alternate employment may not be applied retroactively to the date the injured employee reached MMI and that an injured employee's total disability becomes partial on the earliest date that the employer shows suitable alternate employment to be available. Rinaldi v. General Dynamics Corporation, 25 BRBS at 131 (1991).

Employer/Carrier contend that they have met their burden of establishing available suitable alternative employment through vocational reports prepared by Nancy Favaloro on March 27, 2006, and by Tom Stewart on May 27, 2004, updated on July 12, 2004. The report by Ms. Favaloro lists eight jobs and the report by Mr. Stewart lists two, which Employer/Carrier contend represents suitable alternative employment.

1. Claimant's Work Restrictions

Claimant's work restrictions consist of those listed in the FCE as later clarified by Dr. Bratton. Dr. Dowd has not contradicted the limitations imposed by Dr. Bratton. To the extent that opinions of Drs. Bratton and Dowd differ, as previously discussed, the opinion of Dr. Bratton is entitled to greater probative weight than the opinion of Dr Dowd.

It is noted that the FCE estimated Claimant could return to his prior employment with the restrictions outlined. However, Claimant was unsuccessful at attempting to return to employment at Boh Brothers even with restricted activity. Therefore, further clarification by Dr. Bratton must be taken into account to arrive at the specific applicable restrictions.

Claimant testified that after surgery Dr. Bratton imposed restrictions of keeping head in a neutral position when working, and not to work with his arms above his shoulders, and not lifting heavy weights. (Tr. 33). After his return to Boh Brothers in August 2004, Claimant complained that he experienced pain because of looking up and driving an hour and forty-five minutes each way to and from Boh Brothers which resulted in Dr. Bratton's conclusion that Claimant was not capable of the employment with Boh Brothers, even with the restricted duties.

Dr. Bratton stated that the main restriction in a case such as Claimant's is to avoid repetitive movement of the head and neck, therefore, jobs where looking down is a primary focus should be avoided. Dr. Bratton further stated that driving a vehicle can be a stress factor to the neck because of the need to look around to check traffic and mirrors.

Dr. Bratton did not state a quantitative limit to Claimant's ability to drive. Instead, he stated driving is in the category of activity that is okay for Claimant to "try it and see what would happen." Ms. Favaloro testified that Claimant reported he can drive for about forty-five minutes before having difficulty.

Based on the foregoing, I find that the appropriate standard for analysis and determination of Claimant's ability to perform specific jobs consists of limitations identified in the FCE as modified to include additional restrictions for driving activity and repetitive movement of the head and neck.

2. Job Requirements and Analysis

Employer/Carrier contends that suitable alternative employment is demonstrated in jobs as outlined in two vocational rehabilitation reports. The first report, issued by Tom Stewart, lists two jobs, Front Desk Clerk at Motel 6 and Security Guard. The second report, issued by Nancy Favaloro, lists eight jobs and comments on Claimant's plans to open a motorcycle accessory store. Ms. Favaloro testified that additional suitable jobs were also available. Under the standards established in Turner, the requirements of each job must be examined both in terms of the abilities of Claimant and availability in the community.

The report by Tom Stewart did not specifically identify jobs as suitable alternative employment. Rather, the jobs are noted in a list of potential employers whom Mr. Stewart contacted prior to meeting with Claimant. Additionally, the report includes no description of the precise nature and terms of the identified positions. Because there is no discussion of the physical or mental requirements or duties involved with these positions, I cannot determine whether Claimant is capable of performing

these jobs. Consequently, I find that the jobs listed by Tom Stewart do not constitute suitable alternative employment.

Similarly, the "additional jobs" identified by Ms. Favaloro, and Claimant's testimony regarding opening a motorcycle accessories store, did not include a sufficient description of the precise nature and terms of the demands of the positions for a determination of whether Claimant is capable of performing them. Accordingly, I find that the jobs identified by Ms. Favaloro which are not included in her vocational report and the motorcycle accessories store employment do not constitute suitable alternative employment.

It is noted that the labor market survey performed by Ms. Favaloro used restrictions as outlined in the FCE, which, as discussed above, are not complete. Although the FCE estimated a physical demand level capacity of "medium," Ms. Favaloro has taken into account the additional restrictions as to weight lifting limitations and overhead work. Classification alone is not determinative of Claimant's ability to perform the tasks necessary in the position.

For most of the eight jobs listed, availability is demonstrated by listing both current and prior periods when openings existed. The jobs are as follows and each is discussed below:

1. Outside Cashier
2. Component Assembler
3. Lab Technician
4. Manager Trainee
5. Sales Associate
6. Product Specialist
7. Communications Officer
8. Service Adviser

Concerning Claimant's mental ability to perform each job, I find that based on Claimant's work history, education and the results of testing performed by Ms. Favaloro, Claimant possesses the mental ability and qualifications to perform, or be trained to perform, all eight jobs identified in the vocational report issued by Nancy Favaloro.

The relevant community within which suitable alternative employment must exist must be within reasonable driving distance considering Claimant's driving restriction. Claimant lives in the Pine Grove, Mississippi community which Mr. Stewart states is eight or nine miles north of Picayune, Mississippi. Ms. Favaloro stated she included Slidell, Louisiana[5], which is about twenty miles from Picayune, in the relevant community. I find that the relevant community includes Slidell, Louisiana as an outer limit. Additionally, the physical requirements of the position must be viewed in conjunction with the length of the commute Claimant must undergo to get to and from the job. Therefore, a more physically demanding job that is located closer to Claimant's residence may be suitable, whereas a less physically demanding job coupled with a longer commute may not be suitable.

To the extent any jobs identified are located farther from Claimant's residence than Slidell, Louisiana, they are rejected as exceeding Claimant's physical capacity. Accordingly, I find that the **Sales Associate** position located in Covington, Louisiana, approximately forty five miles from Claimant's residence[6], does not constitute suitable alternative employment.

Assuming **arguendo** that Covington, Louisiana is within Claimant's relevant community, both the physical demands of the Home Depot job and the driving time and distance must be viewed together to arrive at a determination of suitable alternative employment. While the duties include assisting customers with finding products and making sure inventory is out and available for sale, neither the labor market survey nor testimony addressed the physical demands of this function. Claimant's work restrictions for pain tolerance include crouching, kneeling. Therefore, insufficient information is supplied for a determination of suitable alternative employment on this issue.

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[5] Mapquest query states distance of 20.58 miles based on shortest time, and 19.04 miles based on shortest distance. (*Driving Directions from Picayune, MS to Slidell, LA*, Mapquest, www.mapquest.com/directions/main.adp, Sept. 19, 2006).

[6] Mapquest query states distance of 54.52 miles based on shortest time, and 44.79 miles based on shortest distance. (*Driving Directions from 43 Island Rd, Picayune, MS to Covington, LA*, Mapquest, www.mapquest.com/directions/main.adp, Sept. 15, 2006).

Claimant is also restricted from repetitive movement of the head and neck. This would preclude employment where consistent looking down is required or consistently looking up and then down, or any consistent repetitive movement. The job of **Outside Cashier** includes duties of accepting payments, operating a cash register and providing change. The job requirements as described necessitate constant repetitive movement of the head to take money, operate the register, look down to put money into and take money out of the register and finally looking up to hand change to the customer. Accordingly, I find that the position of Outside Cashier exceeds Claimant's limited capacity and does not constitute suitable alternative employment.

The jobs of Component Assembler and Lab Technician involve assembly of objects at tables. Ms. Favaloro described the duties of **Component Assembler** as assembling items based on a blueprint. While she speculatively opined that the components may be put on a box to avoid constantly looking down, the employee would still be required to look back and forth from blueprint to component. Thus, the job requires repetitive movement of the head and neck which are beyond Claimant's physical restrictions. The **Lab Technician** position requires assembly of objects at a bench or table, thus looking down would be a primary focus of the job. Even if the objects were elevated, the job would entail some looking back and forth between the components and the finished product. As such, these job requirements exceed Claimant's physical capacity. Accordingly, I find that the positions of Component Assembler and Lab Technician do not constitute suitable alternative employment.

The duties of the **Manager Trainee** consist of working with customers, which includes paperwork, computer work, and occasional driving. The classification is light. Although the activity is varied, both the paperwork and driving aspects require constant and repetitive movement of the head and neck. Working with a computer alone would not involve movement of the head and neck. However, input into a computer from written paperwork or while questioning a customer would arguably involve repetitive movement of the head and neck to enlist a response from the customer or view the data to be input, and then to look at the computer screen during actual input. The record does not provide a specific breakdown of the percentage of time the employee would spend in each activity. However, the majority of the

job activities involve activity that is restricted for Claimant, and thus would be beyond Claimant's physical capacity. This job is located in Slidell, Louisiana, which is the maximum acceptable commuting distance as discussed above. Accordingly, I find that the position of Manager Trainee does not constitute suitable alternative employment.

The duties of a **Product Specialist** for Circuit City in Slidell consist of assisting customers in the selection of various electronic products and operating a computerized register. The job requires alternate standing and walking, and lifting is less than 20 pounds.

While lifting and carrying restrictions are met with this position, restrictions for pain tolerance include crouching and kneeling. Since the location of this job is at the maximum acceptable commuting distance, it is particularly important to include both the physical demands of the job and the impact of the commute in the determination of suitable alternative employment.

The record is silent on the specific physical functions of the Product Specialist position. Some activity such as bending to retrieve items from a bottom shelf would fall into the restricted category, and would need to be considered for a determination. Since insufficient information as to the precise nature of the physical demands of this position is included for a determination, I find that the position of Product Specialist does not constitute suitable alternative employment.

The duties of the **Communications Officer** consist of receiving calls while wearing a headset and input into a computer. Ms. Favaloro testified that the employee is trained to input information into a computer after it is handwritten. The act of handwriting information during a phone call and then inputting that information into a computer would necessitate repetitive movement of the head and neck. This activity would be the primary focus of this job. Therefore, this job is beyond Claimant's physical capacity.

Openings for the Communications Officer position were available in April and November 2004. Unlike the other positions listed, no availability is noted in the vocational report for openings in 2005 or 2006. However, Ms. Favaloro testified that there were openings in March 2006.

Under Turner, for a job to constitute suitable alternative employment, it must be reasonably available in the community for which the Claimant is able to compete and which he is reasonably and likely to secure. If openings occur as infrequently as every two years, the position may not meet the requisite standard of availability.

The duties of a **Service Advisor** for an automobile dealership in Picayune, Mississippi, consist of meeting with customers, writing information, recording it into a computer, and communication with technicians. More specifically, Ms. Favaloro testified that the worker will get up to talk to customers[7], then sit at a desk or table to write down what is wrong with the car, and bringing paperwork to technicians. The worker will also work up prices and use a computer.

As noted earlier, computer use alone does not demand activity that is restricted for Claimant. However, the act of input from other paperwork, or production of other paperwork does require repetitive movement of the head and neck, which is restricted movement for Claimant. The question of whether this activity is sufficient to constitute a job that is beyond Claimant's physical capacity is dependent on the quantity and degree of the physical demands. Ms. Favaloro testified on cross-examination that she believes this position would not require looking down for extended periods of time because the worker would alternately talk to people. No quantitative measure of the activity is included in the record. Because this job is located closer to Claimant's residence, the driving restriction need not be considered. Also a greater portion of the work day devoted to paper work would be acceptable in this position as opposed to a job located in Slidell.

[7] The record does not state whether additional physical effort is expected, such as stooping, kneeling or movements involving the head and neck to observe damaged or malfunctioning parts of the vehicle, upon initial communication with customers.

However, since this position does contain restricted activity and there is insufficient information in the record for a determination as to whether or not these activities are within an acceptable degree, I find that suitable alternative employment is not established by this position.

3. Conclusion

Based on the foregoing, I find and conclude Employer/Carrier have not demonstrated suitable alternative employment and Claimant is entitled to temporary total disability benefits from February 28, 2003 to November 24, 2003, and permanent total disability from November 25, 2003, to present and continuing, excluding the period from August 24, 2004 through January 20, 2005, based on his average weekly wage of $820.00.

D. Entitlement to Medical Care and Benefits

Section 7(a) of the Act provides that:

> The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.

33 U.S.C. § 907(a).

The Employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the Employer, the expense must be both reasonable and necessary. Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979). Medical care must also be appropriate for the injury. 20 C.F.R. § 702.402.

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition. Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury. Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury. Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

Claimant testified that no requested medical treatment was denied by Employer, although some was delayed. Reference is made to steroid injections, but the record does not reflect Claimant making a request for such treatment at any time. The only medical or related expense that Claimant contends has not yet been paid is mileage since January 2005.

Because Employer/Carrier does not address Claimant's request, I find Claimant's request is uncontested. Accordingly, I find that Employer/Carrier are liable for the mileage expense of Claimant since January 2005 at a rate equal to that paid to witnesses appearing in federal court[8].

Since Claimant has established a compensable injury, Employer/Carrier remain responsible to provide reasonable and necessary medical care and treatment for his work related injury.

[8] The rate paid to witnesses in federal court is established by 28 U.S.C. § 1821 as equal to that established by the Administrator of General Services under his authority pursuant to 5 U.S.C. § 5704(a)(1) and may not exceed the single standard mileage rate established by the Internal Revenue Service. The Administrator of General Services has established rates equal to the IRS mileage rate for automobile expense, which is $.405 per mile for the period of January 1, 2005 through August 31, 2005, $.485 beginning September 1, 2005 through December 31, 2005, and $.445 beginning January 1, 2006. Department of the Treasury, Internal Revenue Service, *Your Federal Income Tax for Individuals*, Pub. 17, at 174 (2005). Department of the Treasury, Internal Revenue Service, *Internal Revenue Bulletin 2005-51*, Revenue Procedure 2005-78 at Sec. 2 (December 19, 2005). 41 CFR § 301-10.303 (2006).

V. SECTION 14(e) PENALTY

Section 14(e) of the Act provides that if an employer fails to pay compensation voluntarily within 14 days after it becomes due, or within 14 days after unilaterally suspending compensation as set forth in Section 14(b), the Employer shall be liable for an additional 10% penalty of the unpaid installments. Penalties attach unless the Employer files a timely notice of controversion as provided in Section 14(d).

In the present matter, Employer did not refuse payment, but paid at an incorrect rate initially because the claim was handled under state workman's compensation rules rather than as a LHWCA claim. Employer has not discontinued benefits. The correct amount of weekly benefits has been stipulated by the parties as $546.67. Employer filed a Notice of Controversion on January 3, 2004.

In accordance with Section 14(b), Claimant was owed compensation on the fourteenth day after Employer was notified of his injury or compensation was due[9] Thus, Employer was liable for Claimant's total disability compensation payment on March 14, 2003, fourteen days after Claimant ceased work. Employer commenced payment of compensation on March 21, 2003. Had Employer controverted Claimant's right to compensation, Employer would have had an additional fourteen days within which to file with the District Director a notice of controversion. Frisco v. Perini Corp. Marine Div., 14 BRBS 798, 801, n. 3 (1981). Thus, to prevent application of a penalty for any delayed or insufficient payment, a timely notice of controversion should have been filed by March 28, 2003. Consequently, I find and conclude that Employer did not file a timely notice of controversion by March 28, 2003, and is liable for Section 14(e) penalties for the difference between the stipulated total disability compensation amount of $546.67 and the amount paid to Claimant from February 28, 2003 until January 3, 2004, $516.92. Section 14(e) penalty attaches to compensation and not medical expenses. Accordingly, Employer is not liable for penalty on any medical expense.

[9] Section 6(a) does not apply since Claimant suffered his disability for a period in excess of fourteen days.

VI. INTEREST

Although not specifically authorized in the Act, it has been an accepted practice that interest is assessed on all past due compensation payments. Avallone v. Todd Shipyards Corp., 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed percentage rate no longer appropriate to further the purpose of making Claimant whole, and held that ". . . the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). Grant v. Portland Stevedoring Company, et al., 16 BRBS 267 (1984). Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. This applies to compensation only, not reimbursed medical expenses.

VII. ATTORNEY'S FEES

No award of attorney's fees for services to the Claimant is made herein. An application for fees has been made by the Claimant's counsel to which Employer/Carrier have filed a memorandum in opposition and objection. This matter will be the subject of a supplemental decision and order to issue in the near future.[10]

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[10] An attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered

VIII. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law, and upon the entire record, I enter the following Order:

1. Employer/Carrier shall pay Claimant compensation for temporary total disability from February 28, 2003 to November 24, 2003, based on Claimant's average weekly wage of $820.00, in accordance with the provisions of Section 8(b) of the Act. 33 U.S.C. § 908(b).

2. Employer/Carrier shall pay Claimant compensation for permanent total disability from November 25, 2003 to present and continuing thereafter, excluding the period from August 24, 2004 through January 20, 2005, based on Claimant's average weekly wage of $820.00, in accordance with the provisions of Section 8(a) of the Act. 33 U.S.C. § 908(a).

3. Employer/Carrier shall pay to Claimant the annual compensation benefits increase pursuant to Section 10(f) of the Act effective October 1, 2004, for the applicable period of permanent total disability.

4. Employer/Carrier shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's December 17, 2002, work injury, pursuant to the provisions of Section 7 of the Act.

5. Employer/Carrier shall be liable for an assessment under Section 14(e) of the Act to the extent that the installments found to be due and owing prior to January 3, 2004, as provided herein, exceed the sums which were actually paid to Claimant.

6. Employer/Carrier shall receive credit for all compensation heretofore paid, as and when paid.

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after **March 3, 2005**, the date this matter was referred from the District Director.

7. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982); Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

ORDERED this 21st day of September, 2006, at Covington, Louisiana.

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LEE J. ROMERO, JR.
Administrative Law Judge